

U.S. SUPREME COURT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

Nos. 18 and 36

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Appellee, and
THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Petition for Rehearing
of
Appellee

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that the Michigan and Detroit ad valorem property taxes were in effect specific taxes "for the privilege of using or possessing" Government-owned property and that the differences between such types of taxes were not basic or fundamental, but mere "empty formalisms" —

was never urged by Appellants, the issue was not before the Court, and Appellee was not afforded a fair opportunity to be heard thereupon. The question was injected into this case for the first time by the majority of the Court in its opinion.

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THE MURRAY CORPORATION OF AMERICA,
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*ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT*

**Petition for Rehearing
of
Appellee**

TO THE HONORABLE JUSTICES OF THE
UNITED STATES SUPREME COURT:

The Murray Corporation of America, the Appellee above-named, presents its Petition for Rehearing of the above-entitled cause, and in support thereof, respectfully shows:

The point upon which the majority based its opinion---

that the Michigan and Detroit ad valorem property taxes were in effect specific taxes "for the privilege of using or possessing" Government-owned property and that the differences between such types of taxes were not basic or fundamental, but mere "empty formalisms"—

was never urged by Appellants, the issue was not before the Court, and Appellee was not afforded a fair opportunity to be heard thereupon. The question was injected into this case for the first time by the majority of the Court in its opinion.

The Appellants (City of Detroit and County of Wayne) at no time in this case (before the District Court, Court of Appeals or Supreme Court) contended that the ad valorem taxes here in question were in effect specific taxes "for the privilege of using or possessing" property, title to which was vested in the United States.

The conclusion of the majority of the Court that the Michigan and Detroit "General Property Tax" in effect was a privilege or specific tax for "the privilege of using or possessing personal property" was introduced into this case for the first time by the majority opinion.

Appellants expressly admitted throughout that:

"Neither the County nor the City has contended that these levies were specific taxes or that they were not ad valorem property taxes."

This was not an issue before this Court. Appellee therefore never had a fair opportunity or occasion before this to address itself to the substantive fallacy of the foregoing conclusion (of the majority) under the Michigan Constitution and long line of Michigan and United States decisions to the contrary.

In the District Court

City of Detroit Brief

At the outset the City of Detroit (Pages 1 and 2) stated:

"This case . . . deals with the right of local subdivisions of state government to impose nondiscriminatory **ad valorem taxes on personal property acquired**, and being processed by an independent contractor . . . for eventual delivery to the United States Air Force."

At Page 43 the City of Detroit, frankly stated:

"It is defendant's position that **the assessment** in the present case was **against the property** in question **under Michigan law**.

And again at Pages 55 and 56, arguing that title to the property was only a security title in the Government, the City of Detroit contended that:

"It would escape altogether the payment of this non-discriminatory property tax which is required to be **assessed against all property**, real and **personal**, **within the jurisdiction** of the state by **constitutional and statutory** provisions existing in **Michigan**."

The **County Brief** adopted the City argument on these points.

This is a far cry from any contention or conclusion that the ad valorem property taxes were not assessed against the property but were in substance and effect specific or privilege taxes for the use of the property. The District Judge in his

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opinion clearly understood the argument and contention of Defendants (City of Detroit and County of Wayne) to be as set forth hereinabove (R. 117 and 118).

In the Court of Appeals

City of Detroit Brief

At page 2, the City of Detroit stated:

"Appellee in this case asked the Court to grant it immunity from a nondiscriminatory **ad valorem tax on appellee's property interest in the personal property** in its possession which it acquired and fabricated for profit as an independent subcontractor."

At Page 40, the City of Detroit stated:

"The taxes are nondiscriminatory, that is, 'uniform', as required by the Constitution of Michigan, Article X, Section 3."

This section of the Michigan Constitution requires that only ad valorem property taxes upon the property be uniform. This constitutional provision as to uniformity does not relate to specific or privilege taxes.

County Brief

At Page 35, the County stated:

"... we contend ... that no absolute title to property vested in the United States and that the **property in question** was therefore still **subject** to an **ad valorem property tax**."

And again at Page 47:

"... never intended an absolute title to pass to the United States government in the personal **property subject** to the **ad valorem tax**."

This is directly contrary to the conclusion that the tax here involved is not a tax upon the property, but is one for the privilege of using or possessing the property.

Joint Reply Brief of Appellants (Page 13)

"Neither the County nor the City has **contended** that these levies were specific taxes or that they were not ad valorem property taxes.

Court of Appeals Opinion

The Court of Appeals in its opinion clearly understood that the Appellants City and County were not contending that these taxes were specific or privilege taxes, for "using or possessing" but that they were contending that "the inclusion of the partial payment-title vesting clause would not defeat an **ad valorem tax on personal property** . . ." (R. 273)

Before the United States Supreme Court

Jurisdictional Statement of Detroit and Wayne County

At page 5 under **"Questions Presented"** Appellants stated that the question before this Court was—

Whether the partial payment-title vesting clause caused invalidation of "state and local taxing statutes and non-discriminatory **ad valorem personal property taxes upon such materials** . . ."

At page 6, under the heading of **"Statement of the Case"** Appellants state to this Court:

"The matter here presented involves an appeal of three consolidated causes brought by plaintiff-appellee to recover **personal property ad valorem taxes** levied by defendants appellants based on a common assessment as of January 1, 1952 **upon personal property** in appellee's possession . . ."

"The mere finding that this is an **ad valorem property tax on personal property** of the government in the hands of a private party is not just cause for nullifying it, . . ."

Appellants' Petition for Writ of Certiorari

Appellants stated (at page 5)—

"These contentions stem from the imposition of an assessment for the purpose of collecting a nondiscriminatory **ad valorem tax on personal property** acquired and being processed by an independent contractor"

Appellants stated the questions presented for review were—

"Whether inclusion of partial payment and transfer of title clauses would operate to defeat **an ad valorem tax on personal property** in the hands of an independent sub-contractor?"

"Whether the **subject assessed property** is entitled to exemption from a non-discriminatory **ad valorem local property tax**, even if title is held to have passed to the Government by virtue of the questioned contract provisions?"

The **questions** posed by Appellants for review in the Jurisdictional Statement and in the Petition for Writ of Certiorari did not indicate that Appellants were contending that the **ad valorem property taxes upon personal property were in substance and effect specific or privilege taxes for the use or possession thereof.**

In their Joint Briefs before this Court, Appellants did not contend that the ad valorem property taxes were privilege or specific taxes for the use or possession of the personal property. To the contrary, they argued that because personal liability attached (for purposes of collection), such as obtained in *Allegheny*, and because the assessing officers, (without authority under Michigan law) stated that the assessment was subordinate to rights of the Federal Government, the incidence of the ad valorem property tax was therefore on the contractor. (Under the statute he would have a lien on the Government-owned property and be entitled to collect the same from the owner.) This same argument was made by the County in *Allegheny* and was flatly rejected by this Court.

With the issues framed as they were before this Court, in

Appellants' Jurisdictional Statement, Petition for Certiorari and Brief, Appellee could hardly be expected to meet a contention that the taxes in substance or effect were privilege or specific taxes for use or possession.

The majority opinion frankly admits that the tax statute does not state that it is "for the privilege of using or possessing personal property," and such language is added by implication and by judicial legislation long proscribed by this Court. As will be pointed out hereafter, the Michigan Constitution recognizes a basic and fundamental difference between ad valorem property taxes and specific or privilege taxes.

At the Oral Argument before this Court

In the *Murray* case, Counsel for the City, on November 13, 1957 in response to pointed questions from the Court, including some of those who joined in the majority opinion, virtually conceded that the taxes were ad valorem property taxes. Mr. Taylor, in closing, on November 14, 1957 directing his rebuttal to the title question, **frankly stated in no uncertain terms that the taxes in question were plain, ordinary ad valorem, property taxes.**¹

At no time at the oral argument did counsel for the City or the County contend that these taxes were in effect privilege or specific taxes for the privilege of using or possessing the property.

The transcript of Mr. Taylor's concluding arguments, and other arguments of counsel, we understand, is available to the Court, but not to counsel.

It might now be claimed that Appellants suggested this question in their reply brief (p. 31) served upon Appellee two or three days before the Argument. This **question was never raised before** and was not urged by Appellants at the Oral Argument. Appellee was never afforded an opportunity to file a reply brief—though no reply was indicated by virtue of Appellants' admissions that the tax was an ordinary ad valorem property tax. For Appellants to attempt to inject an issue into the case for the first time in a reply brief hardly is a prescribed, accepted or fair way in which to raise an issue before this Court. See, Jurisdictional statement of questions, *supra*, p. 5.

Borg-Warner Case Continental Case

The City of Detroit (Appellants here) in its brief before this Court in the *Borg-Warner* case, No. 26, at Page 8, et seq., argued—as we here argue—

“Under the **Constitution of Michigan** there are two general **methods** of taxation—**ad valorem** and **specific**. *Piquette v. Auditor General*, 120 Mich. 95, 108 (1899); *C. F. Smith Co. v. Fitzgerald*, 270 Mich. 659, 673 (1935).

“One of the definitions of **ad valorem** taxes, given in the *Piquette* case (p. 99), *supra*, which is similar to that given in *Cooley on Taxation*, Vol. 1 (4th Ed.) p. 143, is:

“Ad valorem—according to value—* * * An ad valorem tax is a tax or duty upon the value of the article or **thing subject to taxation**.”

Counsel for the City of Detroit further argued (Pages 9 and 10):

“License taxes, **privilege taxes** and occupation taxes are **specific** taxes and **not ad valorem** taxes upon property. *C. F. Smith v. Fitzgerald*, *supra*.”

At the oral argument on November 14, 1957, Mr. Roger O'Connor, Assistant Corporation Counsel for the City of Detroit, was asked whether the tax in the *Murray* case and the tax under Act 189 (the privilege tax) involved in the *Borg-Warner* case were in effect and substance the same. Mr. O'Connor was most careful to point out that the tax in the *Murray* case was an ad valorem property tax in contradistinction to the tax imposed by Act 189, which was a privilege tax for the privilege for use.

This is precisely what the attorneys for the taxing authorities in the *Continental* case contended in their brief and argument before this Court, No. 378. At Page 14 of their brief they state—

"Property taxes are regarded as a tax 'against the property as a thing,' whereas Act 189 imposes a purely personal liability upon the lessee or user.

"Property taxes almost invariably become a lien upon the property which is the subject of the tax and the property is the thing looked to for collection. The tax imposed by Act 189 becomes 'a debt due from the lessee or user' recoverable **only** in an action of assumpsit."

Thus, from the beginning to the end of the litigation, Counsel for Appellants and other taxing authorities urged the basic distinction between the Michigan ad valorem property tax and privilege taxes, such as Act 189.

The requirements of ordinary due process and common fair play should impel the majority of this Court to afford the Appellee and the Federal Government the opportunity to fairly present their arguments and authorities on this issue—not squarely before the Court at any time prior to this—particularly in a case of such far reaching importance (the impact of which (we are advised) will exceed \$400,000,000 a year on the Federal Government).

We are confident that the majority of this high Court after such argument would not conclude—from implication and adding language to the Michigan tax laws—that the ad valorem property taxes here in question are privilege or specific taxes. To conclude that such taxes are privilege or specific taxes ignores the plain language of the tax statutes and obliterates and overrides basic and fundamental tax concepts prescribed by the Michigan Constitution (which in its present form (regarding taxes) has been in effect for over a hundred years). We are convinced that upon square presentation of this issue upon rehearing this Court will not conclude that the difference between the ad valorem property tax in Michigan and a specific or privilege tax for use or possession such as was involved in Act 189 in the *Borg-Warner* case were "empty formalisms."

2.

- (a) The distinction in Michigan between an ad valorem property tax and a specific (privilege) tax for "using or possessing" property is basic and fundamental under the Michigan Constitution and Michigan decisions thereunder and is not an "empty formalism";
- (b) To hold otherwise, as is done by the majority opinion, is to do violence to and to obliterate the express provisions and mandate of the Michigan Constitution and long line of Michigan decisions in effect for over 100 years and to overrule a long line of decisions of the United States Supreme Court.

Under the **Constitution of Michigan** there are two general methods of taxation—ad valorem and specific. *Pingree v. Auditor General*, 120 Mich. 95, 108 (1899); *C. F. Smith Co. v. Fitzgerald*, 276 Mich. 659, 673 (1935).

One of the definitions of ad valorem taxes, given in the *Pingree* case (p. 99), *supra*, which is similar to that given in *Cooley on Taxation*, Vol. 1 (4th Ed.) p. 143, is:

"Ad valorem—according to value—* * * An ad valorem tax is a tax or duty upon the value of the article or thing subject to taxation."

License taxes, **privilege taxes** and occupation taxes are specific taxes and **not ad valorem taxes upon property**. *C. F. Smith v. Fitzgerald*, *supra* (672-3).

That this is a basic and fundamental concept of taxation under the Constitution of the State of Michigan—yet mere "empty formalism"—cannot be denied by Appellants. The **foregoing is the very contention made to this Court by the City of Detroit** and is **quoted verbatim** from its brief filed with this Court in the *Borg-Warner* case, No. 26 (pages 8-9; see *supra*, page 8 hereof). To the same effect see brief of tax authorities

in *Continental* case, supra, page 9. And that is the very contention we made in our brief before this Court (pages 92-93).

Article X, Section 3, of the Constitution of the State of Michigan of 1908 provides and makes it mandatory that all taxes—except specific taxes—be uniform (Vol. 1, M.S.A., p. 469). This is the same provision which was contained in Article XIV, Sec. 11, of the Constitution of the State of Michigan of 1850 (Vol. 1, M.S.A., p. 184). Specific taxes are separately and differently dealt with under Article X, Section 4, of the Constitution of 1908. (Vol. 1, M.S.A., p. 414). See Article XIV, Sections 1 and 10 of the Constitution of 1850 (No. 1, M.S.A., pp. 183-4).

The basic distinction between ad valorem taxes **on property** and specific or privilege taxes was known to the constitutional convention of Michigan in 1850 and the difference was woven and ingrained into the basic constitutional law of the State of Michigan. That this is so was held by the Michigan Supreme Court in the leading case on the subject, *Pingree v. Auditor General*, 120 Mich. 95 (1899), wherein Governor Pingree, of the State of Michigan, raised this very basic and fundamental question. The Supreme Court of Michigan said:

"We have only to examine the statutes in force at the time the Constitution was adopted, to see that **the term 'specific tax' was known and applied in this State previous to the meeting of the constitutional convention.** (page 100)

"... In view of these laws, some of which continued in force after the adoption of the Constitution, we are satisfied that **the convention understood the meaning of the term 'specific taxes,'** and used it in no other than the common and well-settled sense of the term ... (page 101) ...

"If the tax in this case is clearly an ad valorem tax, if it is a tax on property,—and this cannot be questioned, be-

cause the title and the act both call it a tax on telegraph lines, which are property,—there is **nothing in the law to indicate that an occupation tax or tax upon business was intended**, even were we to hold that its ad valorem feature would not necessarily preclude its being denominated a specific tax. (page 102)

"It appears to me impossible to read the definition of the levographers and the decisions of the courts without reaching the conclusion that the **terms 'specific tax' and 'ad valorem tax' have a well-defined meaning; and in the Constitution of this State, as well as in the statutes and decisions, these definitions are clearly recognized.** Concise definitions are given in 25 Am. & Eng. Enc. Law, 17, notes 2, 3, and Cooley, Tax'n (2d Ed.), 238." (p. 109)

And this basic principle and distinction so enunciated in the *Pingree* case was again forcefully enunciated in *C. F. Smith Co. v. Fitzgerald*, 270 Mich. 659, *supra*, at 672, 673 (1935).

Article X, Section 21 of the Michigan Constitution of 1908 also contains a basic and fundamental limitation regarding ad valorem taxes, providing, among other things, that—

"the total amount of taxes **assessed against property** for all purposes in any one year shall not exceed $1\frac{1}{2}\%$ of the assessed valuation of said property . . ."

(Vol. 1, M.S.A., 1957 Cum. Supp., p. 173). This constitutional limitation as to the extent of ad valorem **property taxes "against property"** has been deemed to be an important safeguard for taxpayers. See numerous decisions in Michigan relating thereto (Vol. 1, M.S.A. pp. 426-428, 1957 Supp., pp. 173-178). Surely, this constitutional provision relating to ad valorem property taxes—as distinguished from specific taxes—is fundamental and not a mere "empty formalism."

This difference is also recognized as a basis for the allocation of funds for State purposes, under Article X, Sec. 1 of

the Constitution of 1908, (see footnote and decisions, 1 M.S.A. p. 497, and 1957 Supp. p. 163; also see footnotes regarding other bases for the distinction in re The General Property Tax Act here in question, 6 M.S.A., Sec. 7.1, under heading "Cross References").

The very title to the Michigan General Property Tax Law states in unequivocal language that the **sole object** of the statute is:

"An act to provide for the assessment of property and the levy and collection of taxes thereon . . ."

and not a privilege tax or tax upon the person.

Article V, Section 21, of the Michigan Constitution of 1908 (1 M.S.A., Page 303), provides:

"Section 21. No law shall embrace more than one object, which shall be expressed in its title."

Under this constitutional provision the operation of a statute must be restricted to the object expressed in the title, and **the scope of the title of an act cannot be enlarged by the courts.** *Vernor v. Secretary of State*, 179 Mich. 157; *American Baptist Missionary Union v. Peck*, 10 Mich. 341; *Ryerson v. Utley*, 16 Mich. 269; *Vaughl v. Gale Construction Company*, 333 Mich. 672.

Section 1 of the Michigan General Property Tax statute provides:

"(6 M.S.A., Sec. 7.1) Property Subject to Taxation. Section 1. The People of the State of Michigan enact, that all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

The **subject** of the tax is the **property**, not the person owning or possessing it.

The difference between a tax for the "privilege of using or possessing," (such as Mr. Justice Black suggests by implication, is the character of the Property Tax in Michigan) and the **ad valorem property tax, upon the property itself** is a basic Michigan constitutional distinction, which must be observed in Michigan. In a case involving a Michigan privilege-tax law for the privilege of "use, possession, or storage," The Michigan Supreme Court pointed out in *Banner Laundry v. State Tax Board*, 297 Mich. 419, at 429:

"The use tax is an excise tax (as contra-distinguished from an ordinary property or ad valorem tax) imposed on the privilege of using . . . tangible personal property . . . located in this State . . . It follows that this excise tax or privilege tax is not subject to the above quoted Article X, Section 21, of the Constitution, because it is not a tax 'assessed against property,' but instead is a specific tax."

To hold, by implication, as did the majority of the Court in the Murray case, that the general property ad valorem tax is in effect a specific or privilege tax for use or possession, and that the distinction between the ad valorem taxes on property and specific or privilege taxes for use or possession are "empty formalisms" means that five Justices of this Court, (who seldom, if ever before, have had occasion to consider the Michigan General Property Tax Law) must **override, obliterate and nullify**—

(a) a basic and fundamental concept of taxation [woven into the fabric of Michigan's Constitution since 1850];

(b) the express object and language of Michigan's general ad valorem tax law on property which has been in effect in substantially its present form for over 100 years;

(c) the interpretation and decision of the basic constitutional distinction between ad valorem property taxes on property and specific or privilege taxes by the Supreme Court of Michigan for over sixty years, and

(d) a long line of decisions of the United States Supreme Court.

The framers of the Michigan Constitution in 1850, the legislators of the State of Michigan and the Michigan Supreme Court Judges, construing the Constitution and the tax laws, throughout the years considered the difference between the two types of taxes basic and fundamental. They did not regard the distinctions as "empty formalism."

The Supreme Court of the United States, in one of its leading cases which involved the distinction between a direct tax on property and an excise or privilege tax, measured by the value of the property—*Fliet v. Stone Tracy Co.*, 220 U.S. 107, held, at page 150:

"The Pollock case construed the tax there levied as direct, because it was imposed **upon property** simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or **doing business** in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The **difference** between the acts is **not merely nominal**, but rests upon **substantial differences** between the **mere ownership of property** and the **actual doing of business** in a certain way."

See statements to the same effect at page 147, and at 165.

This same distinction was recognized and followed as basic in determining the question of immunity from state taxation in *Pacific Co. v. Johnson*, 285 U.S. 489, at 490-491, following *Fliet v. Stone Tracy Co.* See, *Plummer v. Coler*, 178 U.S. 115. More recently, the Court, in *Tradesmen's National Bank of Oklahoma v. Oklahoma Tax Commissioner*, 309 U.S. 560, recognized the basic distinction in *Fliet v. Stone Tracy* and *Pacific Co. v. Johnson*, at page 565. It is significant that in the **Tradesmens Bank** case two of the **Justices (Black and Douglas)** who, in the majority opinion in the *Murray* case at bar, now suggest that the differences between

the Michigan ad valorem property tax on property and a privilege tax for the privilege of using or possessing the property constitute "empty formalisms" there recognized by their concurrence that—

"The difference . . . **is not merely nominal**, but rests upon **substantial differences** between the mere ownership of property and the doing of business in a certain way."²

Compare *Esso Standard Oil Co. v. Frans*, 345 U.S. 495, 499; *United States v. Allegheny*, 322 U.S. 174.

This same distinction appears in a number of United States Supreme Court cases, too numerous to cite, and if the majority opinion in the *Murray* case stands, the principles of constitutional law enunciated by this Court in those cases must, of necessity, be shunted into limbo.

3.

By admittedly adding language to the General Michigan and Detroit ad valorem property tax laws, the majority of the Court have taken upon themselves the complete revision of the Michigan Constitution (with respect to taxation) and the property tax laws.

In addition to the provision of Article V, Section 21, of the Michigan Constitution of 1908, which requires that no law shall embrace more than **one object, which shall be ex-**

²*Hanneford v. Silas Mason Co.*, 300 U.S. 577, 582, cited in the majority opinion, is not valid support for the proposition that there is no basic distinction between ad valorem property taxes and privilege taxes. It was there held (pp. 582-3) that since the State tax—whether a privilege tax for use or a property tax upon property—did not become operative until **the goods had come to rest in the taxing state**, that, therefore, there could be no violation of the Commerce Clause. The nature of the tax was immaterial to the decision. On the other hand, the distinction between the two types of taxes,—whether or not the **tax is upon** government owned property—is important in deciding the question of constitutional immunity of government owned property from State taxation, as this Court has held in decisions cited above.

pressed in its title, supra, page 13, Article X, Section 6, of the Michigan Constitution of 1908 (1 M.S.A. 416), provides that—

“Section 6. Every law which imposes ⁴ a tax shall distinctly state the tax, and the objects to which it is to be applied; . . .”

The Michigan General Property Tax Law state “distinctly state(s) the tax” in its title to be an **“assessment of property . . . taxes thereon.”** By implication and adding language thereto this Court is overriding this constitutional injunction of the State of Michigan and is changing an act “for the **assessment of property . . . collection of taxes thereon**”, which tax is distinctly stated, into a tax “for the privilege of using or possessing property” which is not stated in the title or any other part of the act.³

4.

The privilege tax imposed under Act 189 in the Borg-Warner case is basically different from the ad valorem property taxes in the Murray case and counsel for the City of Detroit and City of Muskegon expressly so urged in their briefs and at the oral argument.

Counsel for the City of Detroit, in the Borg-Warner case, recognized and urged the basic distinction between the privilege tax imposed under Act 189 for the privilege of using property and an ad valorem tax upon the property itself under the Michigan Constitution and a number of leading Michigan decisions thereunder. See the pertinent quotations from the brief of the City of Detroit (Appellants in the Murray case) hereinabove, supra, page 8.

The tax in the Murray case was not an ad valorem tax upon Murray's “possessory interest” since the assessment was at the full value of the property—not merely on such limited “possessing interest”, if it had any value at all. Furthermore, it has not been claimed that a possessory interest may be taxed in Michigan under the General Property Tax Act.

If the General Property Tax Law of Michigan in effect and substance, permitted the State of Michigan to impose a tax upon a private user or possessor of Government-owned property—for the privilege of use or possession thereof—then why was Act 189 deemed necessary by the Michigan Legislature, and why did the Supreme Court of Michigan in the Borg-Warner case, 345 Mich. 601, go to such great lengths to distinguish the privilege tax imposed under Act 189 from ad valorem property taxes upon the property? The differences, as have been pointed out hereinbefore, are basic, fundamental and constitutional, and are not “mere empty formalisms”.

Furthermore, it is to be noted that under Act 189, or similar privilege tax acts, the tax is imposed upon the user or possessor for the privilege of such use or possession. Such user or possessor is obligated to pay the tax for such privilege or use and may not proceed against the owner thereof for the collection of the tax so paid by him. This point was specifically made by Mr. Justice Black speaking for the majority in the Borg-Warner case, when he said:

“The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. **Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien** if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury.”

Under the General Michigan Property Tax Law in question in the Murray case, however, the statute specifically provides for the assessment of personal property at the place “in which the **owner resides**” (Mich. Stat. Ann., Sec. 7.13).

except where the owner is a nonresident, in which event the assessment is made to the person in Michigan in possession or control, with a right of recovery against the owner, secured by a lien on the property (6 Mich. Stat. Ann., Sec. 7.11, Par. Seventh).

The City of Detroit Charter has a provision substantially to the same effect. See Appendix E in our Brief before this Court.

This right of collection from the owner by the person in possession, with a security to him of a lien upon the assessed property until the collection has been effected, has been expressly recognized in *Detroit Shipbuilding Co. v. City of Detroit*, 228 Mich. 145, 148.

By what authority is Murray's right to a first lien upon the Government-owned property assessed, as expressly provided in the statute, denied to it? And, if not denied, then there will be a statutory lien under the law upon Government-owned property and a statutory right afforded to the person in possession to collect from the United States Government.

The fact that the City of Detroit devised a stamp to place upon its assessment roll "subject to prior rights of Federal Government" is not pursuant to authority of the Michigan taxing statute, but is directly contrary thereto. M.S.A., Section 7.81, specifically provides —

"The personal property taxes hereafter levied or assessed by any city or village shall be a **first lien, prior, superior and paramount to any other claims, liens and encumbrances whatsoever** upon the personal property assessed"

This same claim that the lien of the County was subordinate to the interest of the United States was made in *Allegheny* and rejected by this Court.

The assessing offices of Detroit and Wayne County, in practice, in this very case did not attempt to assess Murray for the "privilege of using or possessing" Government-owned property under the general property tax laws here in question.

It is significant indeed that the taxing authorities of the City of Detroit and the County of Wayne never conceived or in administrative practice claimed that Government-owned property, used or possessed by a private contractor, would be subject to assessment under the Michigan General Property Tax Law. In Murray—

"Tools already owned and furnished by the United States Government to appellee Murray under a separate facilities contract were not assessed and therefore are not involved in this dispute (Stipulation No. 1 (3), R. 82).

"Tools built and completed by Murray under its subcontracts on which there had been inspection at the plant prior to January 1, 1952 for use there in performance of said subcontract were not included in the assessments.

(See Appellants Brief, pages 15 and 16).

The value of these tools probably exceeded the assessed value of the materials, taxed, which is the subject of this litigation. Surely the assessing officers who knew of the use of such property (finished tools and facilities) by Murray would have assessed Murray for the privilege of use or possession if they had considered that they had a right so to do under the General Michigan Property Tax Law. Neither the City nor the County can deny that their assessing officers never made any assessments for the use or possession of Government-

owned property in any of the many large plants in Detroit or Wayne County. Such completed Government-owned and furnished property has been and is being used in such contractor's plants. The value of such materials in these large plants in this great industrial area runs into hundreds of millions of dollars.

This has been the continuous interpretation in application of the General Michigan Property Tax Law by the taxing officials throughout the years. This Court has on numerous occasions held that the interpretation placed upon a tax law by those charged with the administrative duty and responsibility of applying those laws—continuously followed for a long period of time—should be given great weight. This is particularly true where this practice is woven into the basic Constitutional law of the State and into a long line of Michigan and United States Supreme Court decisions, *Commissioner v. South Texas Lumber Co.* 333 U.S. 496, 501; *Boyer-Campbell Co. v. Fry* 271 Mich. 282, 296-7.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, the judgment of the United States Court of Appeals for the Sixth Circuit be affirmed.

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March 14, 1958.

CERTIFICATE OF COUNSEL

I, Victor W. Klein, attorney for the above-named Appellee, The Murray Corporation of America, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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Attorney for Appellee,

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